

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)
)
XIT Telecommunications & Technology, Ltd.) File No. EB-07-SE-157
d/b/a XIT Cellular)

MEMORANDUM OPINION AND ORDER

Adopted: November 28, 2007

Released: November 30, 2007

By the Chief, Spectrum Enforcement Division, Enforcement Bureau:

I. INTRODUCTION

1. In this Memorandum Opinion and Order, we admonish XIT Telecommunications & Technology, Ltd. d/b/a XIT Cellular (“XIT”) for failing to include in its digital wireless handset offerings two handset models that meet the hearing aid compatibility requirements for radio frequency interference by September 16, 2005 in violation of Section 20.19(c)(2)(i)(B)(1) of the Commission’s Rules (“Rules”).

II. BACKGROUND

2. In the 2003 *Hearing Aid Compatibility Order*, the Commission took a number of actions to further the ability of persons with hearing disabilities to access digital wireless telecommunications.¹ Among other actions, the Commission required manufacturers and digital wireless service providers to collectively take steps to increase the number of hearing aid-compatible handset models available, and established phased-in deployment benchmark dates for the offering of hearing aid-compatible digital wireless handset models.² In this regard, the Commission required entities within each of these classes that do not fall within the *de minimis* exception³ to begin to offer digital wireless handset models with

¹ *Section 68.4(a) of the Commission’s Rules Governing Hearing Aid-Compatible Telephones*, Report and Order, 18 FCC Rcd 16753 (2003); Erratum, 18 FCC Rcd 18047 (2003) (“*Hearing Aid Compatibility Order*”). The Commission adopted these requirements for digital wireless telephones under authority of a provision of the Hearing Aid Compatibility Act of 1988, codified at Section 710(b)(2)(C) of the Communications Act of 1934, as amended, 47 U.S.C. § 610(b)(2)(C).

² See *Hearing Aid Compatibility Order*, 18 FCC Rcd at 16780; 47 C.F.R. § 20.19(c). In adopting these requirements, the Commission observed, *inter alia*, that “as wireless service has evolved to become increasingly more important to Americans’ safety and quality of life, the need for persons with hearing disabilities to have access to wireless services has become critical.” *Hearing Aid Compatibility Order*, 18 FCC Rcd at 16757.

³ See 47 C.F.R. § 20.19(e)(1)-(2). The *de minimis* exception applies on a per air interface basis, and provides that manufacturers or mobile service providers that offer two or fewer digital wireless handsets in the U.S. are exempt from the requirements of the hearing aid compatibility rules. For mobile service providers that obtain handsets only from manufacturers that offer two or fewer digital wireless handset models in the U.S., the service provider would likewise be exempt from the hearing aid compatibility requirements. Manufacturers or mobile service providers that offer three digital wireless handset models must offer at least one compliant handset model. Mobile service providers that obtain handsets only from manufacturers that offer three digital wireless handset models in the U.S. are required to offer at least one compliant handset model.

reduced emission levels that meet at least a U3-rating⁴ for radio frequency interference by September 16, 2005.⁵ In connection with the offer of hearing aid-compatible handset models, the Commission also required entities to label the handsets with the appropriate technical rating, and to explain the technical rating system in the owner's manual or as part of the packaging material for the handset.⁶ In order to monitor efforts to make compliant handsets available, the Commission required manufacturers and digital wireless service providers to report every six months on efforts toward compliance with the hearing aid compatibility requirements for the first three years of implementation (on May 17, 2004, November 17, 2004, May 17, 2005, November 17, 2005, May 17, 2006, and November 17, 2006), and then annually thereafter through the fifth year of implementation (on November 19, 2007 and November 17, 2008).⁷

3. In June 2005, the Commission reconsidered certain aspects of the *Hearing Aid Compatibility Order* and modified the preliminary handset deployment benchmark specific to Tier I wireless carriers (i.e., carriers with national footprints).⁸ Specifically, the *Hearing Aid Compatibility Reconsideration Order* established that by September 16, 2005, Tier I wireless carriers must offer four digital wireless handset models per air interface, or twenty-five percent of the total number of digital wireless handset models offered by the carrier nationwide, that meet a U3-rating.⁹ The *Hearing Aid Compatibility Reconsideration Order*, however, did not modify the preliminary deployment benchmark or associated labeling requirements for Tier II or Tier III¹⁰ wireless carriers. Tier II and Tier III wireless carriers that do not fall within the *de minimis* exception, therefore, were required to include in their

⁴ Section 20.19(b)(1) of the Rules provides that a wireless handset is deemed hearing aid-compatible if, at minimum, it receives a U3 rating "as set forth in the standard document ANSI C63.19-2001[,] 'American National Standard for Methods of Measurement of Compatibility between Wireless Communications Devices and Hearing Aids.'" 47 C.F.R. § 20.19(b)(1). On April 25, 2005, the Commission's Office of Engineering and Technology announced that it would also certify handsets as hearing aid-compatible based on the revised version of the standard, ANSI C63.10-2005. Thus, applicants for certification may rely on either the 2001 version or 2005 version of the ANSI C63.19 standard. *See OET Clarifies Use of Revised Wireless Phone Hearing Aid Compatibility Standard Measurement Procedures and Rating Nomenclature*, Public Notice, 20 FCC Rcd 8188 (OET 2005). In addition, we note that, since its 2005 draft version, the ANSI C63.19 technical standard has used an "M" nomenclature for the radio frequency interference rating rather than a "U," and a "T" nomenclature for the handset's inductive coupling rating, rather than a "UT." The Commission has approved the use of the "M" and "T" nomenclature and considers the M/T and U/UT nomenclatures as synonymous. *See Section 68.4(a) of the Commission's Rules Governing Hearing Aid-Compatible Telephones*, Order on Reconsideration and Further Notice of Proposed Rulemaking, 20 FCC Rcd 11221, 11238 (2005) ("*Hearing Aid Compatibility Reconsideration Order*").

⁵ *See Hearing Aid Compatibility Order*, 18 FCC Rcd at 16780; *see also* 47 C.F.R. § 20.19(c)(1)-(3).

⁶ *See Hearing Aid Compatibility Order*, 18 FCC Rcd at 16785; *see also* 47 C.F.R. § 20.19(f). In addition, to ensure that the rating information was actually conveyed to consumers prior to purchase, the Commission required digital wireless service providers to ensure that the U-rating of the handsets is available to such consumers at the point-of-sale, whether through display of the label, separate literature, or other means. *See Hearing Aid Compatibility Order*, 18 FCC Rcd at 16785.

⁷ *See id.* at 16787; *see also Wireless Telecommunications Bureau Announces Hearing Aid Compatibility Reporting Dates for Wireless Carriers and Handset Manufacturers*, Public Notice, 19 FCC Rcd 4097 (WTB 2004).

⁸ *See Hearing Aid Compatibility Reconsideration Order*, 20 FCC Rcd at 11238.

⁹ *See id.* at 11232; *see also OET Clarifies Use of Revised Wireless Phone Hearing Aid Compatibility Standard Measurement Procedures and Rating Nomenclature*, Public Notice, 20 FCC Rcd 8188 (OET 2005).

¹⁰ Tier II carriers are non-nationwide wireless radio service providers with more than 500,000 subscribers. Tier III carriers are non-nationwide wireless radio service providers with 500,000 or fewer subscribers. *See Revision of the Commission's Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems, Phase II Compliance Deadlines for Non-Nationwide CMRS Carriers*, Order to Stay, 17 FCC Rcd 14841, 14847 (2002).

handset offerings at least two U3-rated handset models per air interface, and to comply with the associated labeling requirements, by September 16, 2005.¹¹

4. In the *Cingular Waiver Order* released on September 8, 2005, the Commission provided additional relief for entities that offer dual-band GSM digital wireless handsets operating in both the 850 MHz and 1900 MHz bands.¹² Pursuant to its waiver authority, the Commission ruled that it would accept, until August 1, 2006, the hearing aid compatibility compliance rating of the handsets for 1900 MHz operation as the overall compliance rating for the handset.¹³ The Commission, however, imposed a number of reporting and consumer outreach conditions on carriers seeking to avail themselves of this temporary waiver relief.¹⁴ Carriers taking advantage of the waiver are required, *inter alia*, to “ensure a thirty-day trial period or otherwise adopt an acceptable, flexible return policy for consumers seeking to obtain hearing aid-compatible GSM digital wireless handsets,” and must include detailed information in their November 17, 2005, and May 17, 2006, compliance reports “that describes and discusses with specificity efforts to ensure a thirty-day trial period or otherwise flexible return policy for consumers seeking to obtain hearing aid-compatible GSM digital wireless handsets.”¹⁵ The Commission thus provided additional time for carriers and manufacturers to ensure that GSM digital wireless handsets operating in the 850 MHz band would be compliant with its rules when operating in that band. This action facilitated compliance with the deployment benchmark obligations by both manufacturers and carriers, including smaller, non-nationwide wireless carriers, that offer dual-band GSM digital wireless handsets.

5. On April 11, 2007, the Commission released the *Wireless Hearing Aid-Compatible Waiver Order*,¹⁶ addressing waiver requests filed by nineteen Tier II and Tier III wireless carriers for relief from the hearing-aid compatibility requirements for wireless digital telephones. In that *Order*, the Commission denied XIT’s petition for waiver filed on September 16, 2005, as amended on April 25, 2006.¹⁷ XIT’s initial petition requested a six-month extension of the November 16, 2005 compliance deadline until March 16, 2006 in order to ensure the receipt and proper labeling of the hearing aid-compatible wireless digital handsets.¹⁸ The April 25, 2006 amendment requested an extension of the waiver “through April 25, 2006,” because XIT sold the Nokia 6101 handset under the erroneous belief

¹¹ See 47 C.F.R. § 20.19(c)(2)(i).

¹² See Section 68.4(a) of the Commission’s Rules Governing Hearing Aid-Compatible Telephones, *Cingular Wireless LLC Petition for Waiver of Section 20.19(c)(3)(i)(A) of the Commission’s Rules*, Memorandum Opinion and Order, 20 FCC Rcd 15108 (2005) (“*Cingular Waiver Order*”).

¹³ *Id.*

¹⁴ *Id.* at 15117-18.

¹⁵ *Id.* at 15118.

¹⁶ Section 68.4(a) of the Commission’s Rules Governing Hearing Aid-Compatible Telephones, *Petitions for Waiver of Section 20.19 of the Commission’s Rules*, Memorandum Opinion and Order, 22 FCC Rcd 7171 (2007) (“*Wireless Hearing Aid-Compatible Waiver Order*”).

¹⁷ *Id.* at 7184. This amendment was submitted by “Texas RSA-1 Limited Partnership d/b/a XIT Cellular” without further explanation. *Id.* at 7183 n.88.

¹⁸ *Id.* at 7183.

that this handset had the appropriate U3-rating.¹⁹ XIT did not discover this error until April 13, 2006, at which time XIT began selling the hearing aid-compatible Nokia 6061.²⁰

6. In a separate letter to the Commission filed on the same day that XIT amended its waiver petition, April 25, 2006, XIT invoked the relief available through the *Cingular Waiver Order*.²¹ In this letter, XIT indicated that the two digital wireless handsets it sells meet the hearing aid compatibility requirements for 1900 MHz operation and are properly labeled.²²

7. In rejecting XIT's amended petition for waiver, the Commission held that that XIT had failed to demonstrate unique or unusual circumstances warranting the grant of a waiver under Section 1.925(b)(3) of the Rules.²³ The Commission determined that but for XIT's mistake regarding the U rating of the Nokia 6101, XIT could have met the hearing aid compatibility requirements by March 16, 2006, within the six month waiver period it requested initially.²⁴ In light of XIT's failure to exercise "due diligence" in determining the correct rating of the handsets it offered, the Commission determined that the public interest would not be served by granting XIT's amended waiver request.²⁵ Thus, the Commission denied XIT's waiver petition and referred XIT's apparent violation of the hearing aid compatibility requirements to the Commission's Enforcement Bureau.²⁶

III. DISCUSSION

8. Section 20.19(c)(2)(i)(B)(1) of the Rules required digital wireless service providers to begin offering for sale at least two handset models with reduced emission levels that meet at least a U3-rating for radio frequency interference to customers that receive service from the overbuilt (i.e., non-TDMA) portion of their networks by September 16, 2005. XIT did not offer two compliant digital wireless handset models until April 13, 2006, approximately five months after the compliance deadline. As noted above, the Commission determined that XIT had failed to demonstrate unique or unusual circumstances, or the existence of any other factor, warranting a grant of the requested waiver of this compliance deadline. Accordingly, we conclude that XIT failed to offer two digital wireless handset models with reduced emission levels that meet at least a U3-rating for radio frequency interference by September 16, 2005, as required by Section 20.19(c)(2)(i)(B)(1) of the Rules.

¹⁹ *Id.* at 7183-84.

²⁰ *Id.* at 7184.

²¹ See Letter from Michael R. Bennett, Esquire, counsel for XIT, to Angela E. Giancarlo, Associate Chief, Public Safety & Critical Infrastructure Division, Wireless Telecommunications Bureau, Federal Communications Commission (April 25, 2006).

²² *Id.* Specifically, XIT stated that since September 30, 2005, it has sold the Motorola V3 handset with a label containing the performance rating of the handset and a description of the U-rating system. XIT also stated that it sells the Nokia 6061 handset with a label detailing the performance rating of the handset and with associated packaging that describes the technical specifications of the handset and the U-rating system. *Id.* See also *Wireless Hearing Aid-Compatible Waiver Order*, 22 FCC Rcd at 7184.

²³ See *Hearing Aid-Compatible Waiver Order*, 22 FCC Rcd at 7184.

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

9. Although we believe that a monetary forfeiture would be warranted for this violation, we note that the statute of limitations for proposing a forfeiture is one year from the date of violation.²⁷ Accordingly, based upon our review of the facts and circumstances in this case, and because we are barred by the one-year statute of limitations from proposing a forfeiture for this violation, we admonish XIT for failing to offer two digital wireless handset models with reduced emission levels that meet at least a U3-rating for radio frequency interference by September 16, 2005, as required by Section 20.19(c)(2)(i)(B)(1) of the Rules.

IV. ORDERING CLAUSES

10. Accordingly, **IT IS ORDERED** that XIT **IS ADMONISHED** for failing to offer two digital wireless handset models with reduced emission levels that meet at least a U3-rating for radio frequency interference by September 16, 2005, as required by Section 20.19(c)(2)(i)(B)(1) of the Rules.

11. **IT IS FURTHER ORDERED** that copies of this *Memorandum Opinion and Order* shall be sent by first class mail and certified mail, return receipt requested, to counsel for XIT Telecommunications & Technology, Ltd. d/b/a XIT Cellular, Michael R. Bennet, Esq., and Kenneth C. Johnson, Esq. Bennet & Bennet, PLLC, 10 G Street, NE, 7th Floor, Washington, D.C. 20002, and to James Spurlock, President, XIT Telecommunications & Technology, Ltd. d/b/a XIT Cellular, 12324 US Highway 87, Dalhart, Texas 79022-8201.

FEDERAL COMMUNICATIONS COMMISSION

Kathryn S. Berthot
Chief, Spectrum Enforcement Division
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²⁷ See 47 U.S.C. § 503(b)(6)(B); 47 C.F.R. § 1.80(c)(3).